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In the
Supreme Court of the United States
OCTOBER TERM, 1954

No. .....

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
a corporation,
Petitioner,

VERSUS

RAYMOND C. KIFER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Chicago, Rock Island and Pacific Railroad Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on October 30, 1954.

OPINION BELOW

The District Court for the Western District of Oklahoma did not file an opinion or findings of fact and conclusions of law in this case. The opinion of the Court of

Appeals is printed in Appendix A hereto, *infra* (not officially reported).

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1954 (Appendix A, *infra*). A petition for rehearing was filed November 19, 1954, and was denied on November 26, 1954 (R. 130-131). The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254 (1).

QUESTIONS PRESENTED

1. When the trial court refuses a litigant's timely requested written instruction (Petitioner's Requested Instruction No. 3, Appendix B, *infra*), on its defensive theory of the case, to which ruling proper exceptions are taken, and gives a general and abstract charge completely ignoring the litigant's defensive theory and to which no objection is made, does Rule 51, Appendix C hereto, *infra*, preclude consideration of the court's imperfect and deficient charge on appeal?

2. Whether Petitioner was entitled to have the jury instructed that the Federal Employers' Liability Act does not make a railroad an insurer of the safety of its employees but only liable for negligent injury (Petitioner's Requested Instruction No. 4, Appendix B hereto, *infra*).

3. Whether Petitioner was entitled to have the jury instructed that under the Federal Employers' Liability Act a railroad would not be held responsible to an employee for failing to provide a safe place to work if the company

did not know or, in the exercise of reasonable care should have known, of the unsafe condition. (Petitioner's Requested Instruction No. 5, Appendix B hereto, *infra.*)

4. Whether Petitioner is entitled to relief from a verdict of $88,666.00 for an alleged disability which the trial court stated, upon motion for new trial, that Respondent's doctor stated was a "mental illness or something else he could not find" (R. 89).

STATUTE AND RULES INVOLVED

Federal Employers' Liability Act, 45 U.S.C.A. 53, Rules 46 and 51, Federal Rules of Civil Procedure, 28 U.S.C.A.

STATEMENT

Invoking jurisdiction of the Federal District Court for the Western District of Oklahoma under the Federal Employers' Liability Act, the Respondent brought this action against the Petitioner railroad to recover damages for injuries sustained, alleging that while acting as a switchman for the Petitioner in a switching operation and while riding the sill step of the baggage car, he was struck in the side by a baggage truck on the station platform and that such injuries resulted from Petitioner's failure to furnish him a safe place to work (R. 1).

Petitioner answered, admitting jurisdiction, the happening of the alleged accident, but denied any fault or negligence on its part. Petitioner affirmatively alleged that the sole and proximate cause of the accident was the failure of the Respondent employee to perform his work

and duties as a switchman in a reasonable and proper manner especially in that he failed to use ordinary care in observing the manner and place in which he performed his duties as a switchman; that he failed to see and observe the baggage truck and heed its location and presence at the time and place of the accident. As an alternative defense and without admitting negligence but specifically denying the same, Petitioner alleged contributory negligence on the part of the Respondent (R. 5).

On trial the Respondent testified that during the switching operations as switchman he had control of the movement of the train; that it was his duty, as such switchman, to "watch and see that everything was in the clear and that no one stepped off on to the track;" that there were "passengers and baggage men and people working around there" (R. 64).

When it was apparent by the court's order overruling the Petitioner's motion to dismiss made at the conclusion of the Respondent's evidence and renewed at the conclusion of all of the evidence, that Petitioner's theory as to the negligence of the Respondent being the sole and proximate cause of the accident was declined, Petitioner then asked the court to give its requested Instruction No. 3 (Appendix B hereto, *infra*) on contributory negligence, which instruction embodied the duty owing by the Respondent switchman to the Petitioner as a yardstick or guide in determining the question of contributory negligence, to-wit, "If you find that the plaintiff Kifer could have avoided striking the baggage truck by a diligent use of his sense of sight, and if you find that he failed

to look where he was going and what he was doing, then under ordinary circumstances such failure is contributory negligence and your verdict should be that the plaintiff was guilty of contributory negligence." This requested instruction was refused and an exception allowed.

Petitioner, by its Requested Instruction No. 5 (Appendix B hereto, *infra*), asked the court to instruct the jury that the Federal Employers' Liability Act does not make a railroad an insurer of the safety of its employees, but imposes liability only for negligent injury. This requested instruction was refused and an exception allowed.

By its Requested Instruction No. 5 (Appendix B, *infra*), Petitioner asked the court to instruct the jury that under the Federal Employers' Liability Act a railroad company will not be held responsible to an employee for failing to provide a safe place to work if the company did not know, or, in the exercise of reasonable care, should have known of the unsafe condition. This instruction was refused and an exception granted.

In its instructions to the jury (Appendix D hereto, *infra*), the trial court wholly failed to instruct the jury on the duties the law imposed upon the Respondent employee in the performance of his duties as a switchman, or, for that matter, any instruction whatsoever on the duties that Respondent owed Petitioner, not even a general instruction that Respondent owed the duty to exercise ordinary care for his own safety in performing his work. However, the Respondent's theory of the suit was presented to the jury in the court's instruction and, in instructing the jury on the duty of the Petitioner under the Federal Em-

ployers' Liability Act, the jury was told, in part, "It was the absolute and nondelegable and continuing duty of the defendant railway company to exercise ordinary care to provide and maintain for the plaintiff a reasonably safe place to work and a failure to do so would constitute negligence, and if such negligence, in whole or in part, was the proximate cause of the injury to the plaintiff, then the defendant is liable to the plaintiff for damages resulting to the plaintiff in consequence of such negligence * * *" and that "It was also the absolute and non-delegable duty of the defendant railway company to keep the space adjacent to the tracks free of obstructions and in such condition as to permit its employees to perform their duties without unnecessary hazard to life and limb."

Under the instructions of the court the jury returned a verdict against the Petitioner railroad for the sum of $88,666.00. Petitioner moved for judgment notwithstanding the verdict and, in the alternative, a motion for new trial, urging error of the trial court in refusing to give its Requested Instruction No. 3 (Appendix B, *infra*), which embodied its theory of the lawsuit. The motion also raised error in refusal of the court to give the Petitioner's Requested Instructions Nos. 4 and 5 (Appendix B hereto, *infra*), and relief was sought from the excessive verdict of $88,666.00. The motion was denied and an appeal taken to the Court of Appeals for the Tenth Circuit. On appeal the Court of Appeals for the Tenth Circuit found that Petitioner's Requested Instruction No. 3 (Appendix B hereto, *infra*) on contributory negligence, which embodied the legal duty of the Respondent, was "incomplete." The Court found that the instruction given by the trial court

on contributory negligence was "imperfect," but held that because Petitioner did not object to such imperfect instruction, when given, it was, under Rule 51 of the Federal Rules of Civil Procedure (Appendix C hereto, *infra*) precluded from raising the error on appeal. The Court of Appeals further held that it cannot review the action of the trial court in denying relief from the excessive verdict on motion for new trial because it constituted an error of fact. The judgment of the trial court was affirmed. (Opinion of the Court of Appeals, Appendix A, *infra.*)

REASONS RELIED ON FOR THE WRIT OF CERTIORARI

1. The decision of the Court of Appeals in holding that Rule 51 precluded the Petitioner from urging, as error, the trial court's failure to instruct the jury on its theory of the suit after a timely requested instruction embodying such theory had been refused is in direct conflict with decisions of the Court of Appeals for the Eighth Circuit, in *Chi., R. I. & P. RR Co.* v. *Lint* (not yet officially reported but attached as Appendix E, *infra*), and in *Montgomery* v. *Virginia Stage Lines,* 191 F.2d 770, and *Hower* v. *Roberts,* 153 F.2d 153; with a decision of the Court of Appeals for the Third Circuit in *Stilwell* v. *Hertz Drivurself Stations,* 174 F.2d 714; and decisions of the Court of Appeals of the Second Circuit, in *Wright* v. *Farm Journal,* 158 F.2d 976, and *Sweeney* v. *United Features Syndicate,* 129 F.2d 904.

In each of the cases cited, *supra,* from the various Courts of Appeals, it has been pointed out that Rule 51

must be read in conjunction with Rule 46 (Rules 46 and 51, Appendix C hereto, *infra*) and that when the two rules are construed together, Rule 51 does not preclude a litigant from raising error on appeal even though no objection was made if it appears in the record that the point was timely called to the attention of the court by requested instruction or in any other manner sufficient to clearly advise the court as to the question of law involved. And these cases hold that even if the requested instruction is not complete or perfect in wordage, that it imposes upon the court the duty to give a more specific instruction on a particular issue where it soundly appears that such instruction is needful to enable the jury to intelligently determine the question.

This Court has indicated in *Palmer* v. *Hoffman*, 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645, that it would interpret Rule 51 as does the Eighth, Sixth, Third and Second Circuits in the cases cited above, *supra*, and would not preclude a party from raising error on appeal if the requested instruction covering the point was "sufficiently specific to bring into focus the precise nature of the alleged error." In fact, we have found no Court of Appeals which interprets Rule 51 as does the Tenth Circuit in this case.

2. In affirming the verdict of the jury in the sum of $88,666.00 and the judgment of the trial court thereon, where it was apparent on the face of the record and urged as a point of error on appeal that the case was submitted to the jury without the jury being instructed at any time as to the duty which the Respondent employee owed the Petitioner in the performance of his duties as a switchman,

the Court of Appeals sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision.

The Petitioner's Requested Instruction No. 3 (Appendix B hereto, *infra*), sought to expressly put before the jury the theory of the accident and to apply correctly to that theory if the jury accepted it the test for determining the Respondent's liability in the situation. The refusal of the court to give the requested instruction, either in its tendered form or in a restatement of its material substance, was basic error. *Ranney* v. *Barlow*, 112 U.S. 207, 5 Sup. Ct. 104, 28 L. Ed. 660 (6th Circuit); *Chi., & N. W. Ry. Co.* v. *Green*, 164 F.2d 55 (8th Circuit); *Montgomery* v. *Virginia Stage Lines*, 191 F.2d 770 (8th Circuit); *Western Union Tel. Co.* v. *Morris*, 105 Fed. 49 (8th Circuit); *Northern Central Coal Co.* v. *Hughes*, 224 Fed. 57 (8th Circuit); See also *Atch., T. & S. F. Ry. Co.* v. *Hicks* (Okla.) 258 P.2d 672, and other Oklahoma cases cited therein. The courts have held that instructions of the court which have permitted imposition of liability upon a defendant without the jury being instructed as to the defendant's theory of the case is error so basic and prejudicial that even though no objection is made to the charge, the Court of Appeals should, upon its own motion, consider the error when it is apparent upon the face of the record that a miscarriage of justice may occur. *Montgomery* v. *Virginia Stage Lines, supra; Mondshine* v. *Short*, 196 F.2d 606 (5th Circuit); *Dowell, Inc.* v. *Jowers* (5th Circuit), 166 F.2d 214. See also Barron & Holtzoff, Federal Practice and Procedure, Vol. 2, Sec. 1106, pages 804 and 805.

ARGUMENT IN SUPPORT OF THE PETITION FOR THE WRIT

Petitioner earnestly urges that this petition for a writ presents an important question of Federal law in respect to the construction of Rules 46 and 51 of the Federal Rules of Civil Procedure to lawyers throughout the United States who are practicing before the various Courts of Appeals. This Court should grant the petition here and instruct the Courts of Appeals as to the proper construction and applicability of Rule 51 so that there will be complete uniformity in the various circuits. This petition for a writ also poses a question of vital importance to employers under the Federal Employers' Liability Act. This Court has never been hesitant to exercise its discretionary jurisdiction to insure to those coming within the terms and provisions of the Federal Employers' Liability Act the benefits conferred thereunder. As pointed out by this Court in *Wilkerson* v. *McCarthy,* 336 U.S. 53, 69 Sup. Ct. 413, this Court has granted writs of certiorari many times to prevent encroachment by the lower courts upon rights and benefits given employees under the Act. Petitioner seriously feels that no encroachment upon the rights of employees under Federal Employers' Liability Act has been more serious than the right taken from Petitioner in this case to have its theory of the suit against it presented to the jury and to have the question of the Respondent's rights under the Act judged by the duties he owed to this Petitioner. We submit to this Honorable Court that in the circumstances of this case Petitioner was, by the denial of its requested instructions and the

instructions given by the court, made an insurer of the safety of its employee in complete derogation of the Act and the decisions of this Court. As has been pointed out by the courts many times the purpose of Rules 46 and 51 of the Federal Rules of Civil Procedure is to inform the trial judge of possible errors that he may have an opportunity to consider their errors and, if necessary, to correct them, but that where it appears in the record that the theory urged on appeal was called to the attention of the trial court in such a manner as to clearly advise it as to the question of law involved, that is sufficient. Here the Petitioner, by its Requested Instruction No. 3, asked the court to instruct the jury on the duty the Respondent employee owed this Petitioner as a guide for determining the question of contributory negligence. This instruction was not only refused but the trial court did not in any place in its instructions, or even in summary of the pleadings, submit to the jury that the Respondent owed this Petitioner any duty. In the face of the denial of this particular right the trial court submitted Respondent's theory of Petitioner's liability and instructed the jury that "It was also the absolute and nondelegable duty of the defendant railway company to keep the space adjacent to the tracks free and unobstructed and in such condition as to permit its employees to perform their duties without unnecessary hazard to life and limb."

We submit that the judgment rendered in this case in the sum of $88,666.00 establishes on the face of the record that the failure of the trial court to submit this Petitioner's theory of the lawsuit and to instruct as to the

duties of the Respondent makes it apparent that the jury did not consider the question of contributory negligence and imposed liability against the Petitioner as insurer of the safety of its employee.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. SHELTON,
2701 Liberty Bank Building,
Oklahoma City, Oklahoma,

Attorney for Petitioner,
Chicago, Rock Island and
Pacific Railroad Company.

Of Counsel:

SAVAGE, GIBSON, BENEFIELD & SHELTON.

December, 1954.

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 4859 — September Term, 1954

Chicago, Rock Island and Pacific Railway Company, a corporation, Appellant, v. Raymond C. Kifer, Appellee.	Appeal from the United States District Court for the Western District Oklahoma.

J. I. Gibson (Savage, Gibson, Benefield & Shelton were with him on the brief) for appellant.

Rex H. Holden for appellee.

Before PHILLIPS, Chief Judge, and BRATTON and HUXMAN, Circuit Judges.

PHILLIPS, Chief Judge.

Kifer, an employee of the Chicago, Rock Island and Pacific Railroad Company,[1] brought this action under the Federal Employers Liability Act[2] to recover damages for

[1] Hereinafter called the Railroad Company.

[2] 45 USCA § 51, *et seq.*

personal injuries sustained during the course of his employment by the Railroad Company as a switchman at the Union Station in Oklahoma City, Oklahoma.

The jury returned a verdict in favor of Kifer for $88,666. The Railroad Company moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Both motions were denied and the Railroad Company has appealed.

The Union Station at Oklahoma City is a passenger terminal station, jointly operated by the Railroad Company and the Frisco Railway Company. There are nine pairs of tracks adjacent to the station, running east and west, separated by concrete platforms running parallel to the tracks. Each platform is approximately 12 inches higher than the adjacent rail. There is about one inch clearance between the edge of each platform and a car moving on the rails.

At about 6:00 a.m., on the morning of August 14, 1952, the Railroad Company's eastbound passenger train 52 arrived from the west on Track 7. Kifer was a member of a five-man switching crew. It became the duty of the crew to remove certain cars from the train and attach a diner to the train. The crew was working with a single unit diesel switch engine. The crew removed the engine from the train and coupled the switch engine to the baggage car on the east end of the train. After the baggage car was coupled to the train, Kifer signalled the switch engine engineer for a back-up movement in an easterly direction. Kifer rode the side of the engine until it reached the cross-over switch from Track 7 to Track 8, the latter track being located south of Track 7. Kifer then left the switch engine to set the switch for a movement west on Track 8. The engine at that time was headed west. After the switch was set, Kifer signalled the engineer to move west, slowly pushing the cars of the train onto Track 8.

During that operation, Kifer rode on the northwest corner of the lead car with his feet in the upper sill step, which is about one foot above the lower sill step. From that position he passed signals to the engineer, who was on his side of the train, and moved past the point where, later, the accident causing his injuries occurred. During the switching movement westward on Track 8, Kifer was looking to the west, the direction of the movement, in the performance of his duty to see that everything was clear before the cars were moved onto that track. After the cars were placed on Track 8, the baggage car was uncoupled from a railroad Post Office car. Thereupon, Kifer gave the signal to the engineer to back up eastward on Track 8. When the train started to move eastward on Track 8 at a speed of from three to six miles per hour, Kifer stepped on the lower sill step and took hold of the projecting grab iron. For the first 10 to 20 feet, Kifer was looking westward in the performance of his duty to see that the uncoupled cars did not move in either direction. After he observed that the cars were not in motion, he turned to the east. He testified that when he did so, "the bright morning sun hit me in the eyes and I couldn't see anything for a few minutes there, it just blinded me." He said he shook his head a little bit and glanced about and when he looked around he was right against a four-wheeled baggage truck parked on the adjacent platform. When he saw that he could not clear the truck he tried to swing his body around to the end of the car, but was unable to do so in time to avoid being struck by the baggage truck. He was knocked off the baggage car. The switch engine had moved approximately 50 to 75 feet during the backing movement, before the accident occurred.

The baggage truck struck Kifer on the left side between the hip bone and the short ribs and caused him to fall on the rail nearest the platform. He suffered temporary unconsciousness, but soon was able to crawl onto

the platform, but was unable to rise. He was removed to a hospital, where he remained five days. He complained of pain in his back and left side. Diathermy treatments and sedatives were administered. After he returned to his home from the hospital sedation was continued. He received treatments from a chiropractor on the Railroad Company's staff, which were helpful but did not give permanent relief. The chiropractor advised him to try to work again. Kifer worked 11 out of 15 days in October, 1952, but then left the Railroad Company's employment permanently because he believed he was physically unable to continue that kind of work.

The baggage truck was equipped with automatic brakes which were set at the time of the accident. The side of the truck adjacent to the rails was only nine inches from the edge of the platform curb, and created an unsafe place for the switchmen to work. At the time of the accident, Kifer was riding in a normal position for a switchman engaged in his type of work.

Kifer did not know whether the baggage truck was in the same position at the time of the accident that it was when he passed it in the switching movement prior to the accident. The engineer testified that the truck was in the same position during both movements.

Prior to the accident, reports had come to the Railroad Company that baggage trucks were being parked too close to the rails, creating a hazard to switchmen carrying out switching operations at the Union Station. Such parking violated rules and regulations of the Railroad Company.

Continuously, from the time of the accident, Kifer suffered pain in his neck and lower back, accompanied by severe headaches and muscular spasms.

On March 19, 1953, Doctor Gerster W. Brown, a specialist in traumatic surgery, examined Kifer. He testified that Kifer complained of headaches, cervical pain and tension, pain in the mid-lower back at about the level of the fourth lumbar vertebra and anesthesia of the left lower extremity; that Kifer had the appearance of extreme lassitude and an expression of anxiety; that neurological findings revealed absence of the Achilles reflexes bilaterally, a boot-like anesthesia of the left lower extremity; extremely sluggish patella reflexes, a tremor of the hand, and some spasticity of the posterior cervical musculature. He testified that, in his opinion, Kifer was suffering from traumatic neurosis, which is definitely a disabling ailment. He concluded that the accident was the precipitating cause of the traumatic neurosis and that the condition was probably of a permanent nature. He testified that it was as disabling as a severe physical injury, such as a broken back or a broken arm. He stated, in his opinion, that as a result of the accident Kifer was to a large degree permanently disabled from doing any ordinary manual labor. The Railroad Company introduced contradictory evidence to the effect that Kifer's condition was due to bad posture and not to the accident and that he was not permanently disabled from doing ordinary manual labor.

Kifer had an eighth grade education and began working when he was about 16 years of age. He worked as a farm laborer and truck driver. He entered the Armed Services in 1942. While in the Army he drove a truck and hauled troops and supplies. He was discharged from the Army in 1945. After leaving the Army he did truck driving and ordinary manual labor until he was employed by the Railroad Company. Before he entered the employ of the Railroad Company, he was examined by a company doctor and thereafter took two periodic examinations and on each occasion was advised that he was sound physically. Prior to the accident in question, he had never sustained

serious injuries. He was 32 years of age at the time of the accident. He had a life expectancy of 33 years. His earnings as a switchman for the 12 months immediately preceding the accident, less income taxes, aggregated $3,917.87. Had his earnings continued at that rate at the end of his life expectancy, he would have earned more than $125,000, and in approximately 23 years he would have earned the amount of the verdict.

We think there can be no doubt that the parking of the truck so near to the railroad rails as to endanger the switchman constituted actionable negligence on the part of the Railroad Company and that under the facts the jury was warranted in finding that that negligence was the proximate cause of the injury.

Under the facts, whether Kifer failed to keep a lookout and, if so, failed to exercise that degree of care which a reasonable person, under the existing circumstances, would have exercised for his own safety, under the evidence was a question with respect to which the minds of reasonable men might differ, and, therefore, the issue of contributory negligence was one of fact for the determination of the jury. It should be observed that Kifer testified that he did look, but was blinded by the sun, and the instant he realized his danger he undertook to avoid the accident, but was unable to do so.

Counsel for the Railroad Company requested an instruction on contributory negligence. It was incomplete, in that it did not embrace the established test for determining contributory negligence. If given, in effect it would have instructed the jury that if Kifer could have avoided the accident by the diligent use of his sense of sight, and if he failed to look where he was going, they should find him guilty of contributory negligence. It would not have directed the jury to take into consideration all of the surrounding facts and circumstances in determining

whether Kifer exercised that degree of care, which an ordinarily prudent person would have exercised for his safety, under the circumstances, and it confined the jury's consideration to the particular circumstances narrated in the instruction and omitted any reference to other important circumstances. It was properly refused.[3]

The court gave an instruction on the issue of contributory negligence. It was incomplete and imperfect in certain particulars, but counsel for the Railroad Company made no objection and took no exception to the instruction as given. The Railroad Company, therefore, is precluded from assigning such instruction as error under Rule 51 of the Federal Rules of Civil Procedure, 28 USCA.

The Railroad Company urges that the verdict was excessive and that the trial court abused its discretion in not granting a new trial on that ground. A Circuit Court of Appeals may not review the action of a District Court in granting a motion for a new trial on the ground the damages awarded by the jury were excessive, because that is an error of fact.[4] Our province is limited to determining whether the trial court, in denying the motion, abused its discretion.[5] Ordinarily, it will not be held that the trial court abused its discretion in denying a motion for a new trial on the ground that the verdict was excessive, unless it affirmatively appears that it resulted from bias, prejudice, or passion.[6] There is nothing in the record

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[3] *Grand Trunk Railway Co.* v. *Ives*, 144 U.S. 408;
Rio Grande Western Ry. Co. v. *Leak*, 163 U.S. 280, 288;
Carpenter v. *Connecticutt General Life Ins. Co.*, 10 Cir., 68 F.2d 69, 73.

[4] *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481.

[5] *Smith* v. *Welch*, 10 Cir., 189 F.2d 832, 837;
Dubrock v. *Interstate Motor Freight System*, 3 Cir., 143 F.2d 304, 307, 308, c.d. 323 U.S. 765.

[6] *Oklahoma Natural Gas Co.* v. *McKee*, 10 Cir., 121 F.2d 583, 586;
Snowden v. *Matthews*, 10 Cir., 160 F.2d 130, 131.

in the instant case to indicate that the jury was influenced by passion or prejudice. The case was properly tried. The record reflects no appeal to the passion or prejudice of the jury. Accordingly, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

AFFIRMED.

Appendix B

APPELLANT'S REQUESTED INSTRUCTION

No. 3

"If you find that the plaintiff Kifer could have avoided striking the baggage truck by a diligent use of his sense of sight, and if you find that he failed to look where he was going and what he was doing, then under ordinary circumstances such failure is contributory negligence and your verdict should be that the plaintiff was guilty of contributory negligence. Refused and exception allowed S.C., District Judge" (R. 79).

APPELLANT'S REQUESTED INSTRUCTION

No. 4

"The Federal Employers' Liability Act does not make a railroad an insurer of the safety of its employees. The Act imposes liability only for negligent injury. Refused and exceptions allowed S.C., District Judge" (R. 79).

APPELLANT'S REQUESTED INSTRUCTION

No. 5

"Under the Federal Employers' Liability Act a railroad company will not be held responsible to an employee for failing to provide a safe place to work if the company did not know or, in the exercise of reasonable care, should have known of the unsafe condition. Refused and exceptions allowed S.C., District Judge" (R. 78, 80).

Appendix C

Rule 46

Federal Rules of Civil Procedure

"Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Rule 51

Federal Rules of Civil Procedure

"Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Appendix D

Charge to Jury

The Court: It now becomes my duty to instruct you as to the law of the case.

You are the sole and exclusive judges of the facts, but the Court is the judge of the law, *and it is your duty to follow the law as given to you by the Court.*

The burden rests upon the plaintiff to prove his claim by a fair preponderance of the evidence. Likewise, the burden rests upon the defendant to prove its claim of negligence or contributory negligence on the part of the plaintiff by a fair preponderance of the evidence.

By "fair preponderance" of the evidence is not necessarily meant the greater number of witnesses, but it is that proof which satisfies your minds as to its truth when weighed against the evidence in opposition thereto.

In determining the weight or credit that you will give to the testimony of any witness, you may take into consideration the interest, if any, which the witness may have in the result of the trial; his relation to the parties; his bias or prejudice, if any has been apparent; his demeanor upon the witness stand, his means of observation, state of recollection, and his opportunity of knowing the matters about which he has testified, and from all the facts and circumstances appearing in evidence, aided by your general knowledge and common sense, you will reach your conclusions.

If you are convinced in your own minds that any witness has testified falsely as to any material fact, you are at liberty to disregard all of his testimony or any part of it.

Negligence is the doing of a thing that a reasonably prudent person would not do under the circumstances

surrounding him at the time, or it is the omission to do a thing that a reasonably prudent person would do under the circumstances. The degree of care required in any given case is ordinary care.

"Ordinary care" is that degree of care which a person of ordinary prudence would exercise under the particular circumstances. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that may result from neglect.

For a party to be liable because of his negligence, the negligence must have been the proximate cause of the injury for which damages are claimed.

"Proximate cause" is an act which immediately causes or fails to prevent an injury which might reasonably have been anticipated would result from such act or omission.

"Contributory negligence" means that want of ordinary care and precaution upon the part of the plaintiff, if any, which combining and concurring with the negligence of the defendant, if any, proximately contributed to the accident.

It has been charged by the plaintiff and admitted by the defendant that the defendant Railway Company is a common carrier by railroad, engaged in the business of interstate commerce, and that it was engaging in such business on the 14th day of August, 1952, at the time the plaintiff sustained personal injuries. It is further admitted that the plaintiff at the time of sustaining such injuries was in the employ of the defendant in its business and in the performance of the duties of his employment. Plaintiff's cause of action, therefore, is founded and based upon a statutory law of the United States known as the Federal Employers' Liability Act.

The Federal Employers' Liability Act of the United States, which is applicable here, provides that "Every

common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The Federal Employers' Liability Act further provides that an employee shall not be held to have assumed the risk of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents or employees of such Railroad.

It was the absolute and non-delegable and continuing duty of the defendant Railway Company to exercise ordinary care to provide and maintain for the plaintiff a reasonably safe place to work, and a failure to do so would constitute negligence, and if such negligence in whole or in part was the proximate cause of the injury to the plaintiff, then the defendant is liable to the plaintiff for damages resulting to the plaintiff in consequence of such negligence.

It was also the absolute and non-delegable duty of the defendant Railway Company to keep the space adjacent to the tracks free of obstructions and in such condition as to permit its employees to perform their duties without unnecessary hazard to life and limb.

If you find that the plaintiff was guilty of negligence which was the sole proximate cause of the accident, you shall find for the defendant.

If you find that the defendant Railway Company, its officers, agents or employees were guilty of negligence

which in whole or in part was the proximate cause of the accident, you shall find for the plaintiff.

Contributory negligence on the part of the plaintiff, if any you find, is not a bar to his recovery in this case. However, if you find that the plaintiff was guilty of contributory negligence, which combined with the negligence of the defendant Railway Company, its officers, agents or employees was the proximate cause of plaintiff's injuries, then it is your duty to diminish the amount which you find under the evidence plaintiff is entitled to recover from the defendant by an amount in proportion to the amount or percentage of negligence attributable to the plaintiff.

If, under these instructions, you should find that the plaintiff is entitled to recover, then it becomes your duty to assess by way of damages such amount as will fully, fairly and reasonably compensate him for the injuries and damages which he sustained directly and proximately in consequence of the accident. It will be your duty to take into consideration the character, nature and extent of the injuries, and all disability directly and proximately resulting therefrom, including pain and suffering, and all loss of earnings that have resulted or will result in the future by reason thereof. You will consider the life expectancy of the plaintiff as shown by the evidence. You will also take into consideration all past, present and future damages which have proximately resulted, or which it is reasonably certain from the evidence will result in the future by reason thereof. In all, you will allow him such sum, if you find him entitled to recover, as will fairly and reasonably compensate him for his injuries and the damages which you find directly, naturally and proximately flowed from the accident, in all not to exceed the sum of $150,000.00.

I think I possibly should state, as simply as I can, the three rules of law for fear the technical way I have stated them is not entirely clear.

First, if you find the plaintiff was guilty of negligence, which was the sole proximate cause of the accident, you should find for the defendant.

Next, if you find that the defendant Railway Company, its officers, agents or employees were guilty of negligence, which was the sole proximate cause of the accident, then you should find for the plaintiff.

Third, if you find that both parties were guilty of negligence, and that their concurring negligence was the proximate cause of the accident, then you shall find for the plaintiff but, in that event, you will diminish the recovery of the plaintiff in proportion to the amount of negligence on his part that contributed, if you so find, to the accident.

I hope that makes it a little clearer but I think it was clear in the first instance.

Now, Ladies and Gentlemen, in this court it is proper for the Judge to comment on the evidence and express an opinion. I am not going to do so. I think this case has been well tried and all the facts are in evidence and I am sure you paid close attention, and I feel that you are fully competent, without any help from me, knowing the law, to find the facts and apply the law to the facts. So I am not going to comment on the evidence. I am going to instruct you that if you feel you know what my opinion is about it, you are not bound by that, and it is your duty to use your own judgment.

When you retire to consider your verdict, you will select one of your number as foreman, who will preside over your deliberations and sign your verdict when you have reached one. In this court, contrary to State Court, there is no majority verdict. In order to arrive at a verdict, all of you will have to agree.

(Crier sworn to take charge of Jury.)

(Whereupon, the Jury retired to consider of their verdict, and the following proceedings were had):

Mr. Gibson: May we have the record show, Your Honor, that prior to argument and instructions to the Jury that we met in chambers and the Court went over the instructions with counsel and advised the instructions he planned to give and at that time noted upon the requested instructions of the defendant his action thereon and that—

The Court: (Interposing) The defendant and the plaintiff. I disallowed all of the plaintiff's and all of the defendant's and gave instructions which I considered covered the law as stated by both, but I have an exception, too, on each requested instruction.

* * * * * * * * * *

Filed March 12, 1954.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,102

Chicago, Rock Island and Pacific Railroad Company, a corporation,
Appellant,
v.
George W. Lint,
Appellee,

Appeal from the United States District Court for the District of Minnesota.

[November 19, 1954.]

Philip Stringer (Robert O. Sullivan, Arthur J. Donnelly and R. Paul Sharood with him on brief), for appellant.

Donald A. Chapman, Jr. (Davis, Rerat, Yaeger and Lush, Harry H. Peterson and Robert M. Austin on brief), for appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This action is for personal injuries and admittedly arises under Federal Employees Liability Act. Plaintiff

(appellee) was a brakeman on defendant's railroad and at time of collision was serving on freight train crew delivering cattle at Walnut, Iowa. His duty was to signal the engineer to enable proper spotting of cars at unloading chute. He was standing on stock unloading platform about six feet wide to do this. He had no other duties relating to unloading the cattle. The platform leads from the box car to an enclosed ramp leading to the ground. At top of ramp are two gates which, when open, serve as an extension of the fence along the sides of the ramp to the car door, thus making continuous sides from the car door to the ground. Each gate swings on two pintle hinges constructed as follows: attached to the post is a vertical pin 3½ inches long; Cylindrical metal bands or straps attached to the gate fit snugly over the pin. Each gate weighs about 240 pounds.

In the process of unloading the third car three head of cattle rushed out of the car at once and by their impact lifted the east gate off of the pintles. Plaintiff was standing on narrow portion of the platform outside of gate and was forced off platform by the falling gate causing his injuries complained of. Larson, an architect, testified for plaintiff that there are three types of hinges, the fast pin hinge, the loose pin hinge and the pintle hinge, and that of these the pintle hinge is the least safe, and that in his opinion the pintle hinge was unsafe for the purpose for which it was being used. He says further that the pintle hinge could have been made safe by threading top of pintle and putting on lock nut, or by drilling a hole and inserting a cotter pin or by bending over the top of the pintle. That this particular hinge was not a good type of pintle hinge because there was nothing to prevent pintle from tipping over.

Defendant produced testimony that the pintle hinge, like the one used here, now is and has been for many years in use and is standard equipment on cattle gates on the

7,000 miles of track on the Rock Island system. This type of hinge is also shown to be in general use on farm gates. There has not been any previous dislodging of the particular gate involved in this action or of the many similar gates on the system so far as witnesses knew. One of the defendant's witnesses had been with the defendant company thirty-eight years and for sixteen years had supervision of all stock unloading platforms at two hundred locations, and another, a conductor, had twenty-eight years of service. The plaintiff had been with the Railroad since 1944 and admitted that he was thoroughly familiar with the type of gate and hinge used and that equipment at other stations was similar. Plaintiff had never seen or heard of such a gate becoming dislodged and he had foreseen no danger in this respect. Plaintiff's witness Suhr testified he was familiar with Walnut yard for over thirty years, that he had frequently assisted in unloading cattle and had never seen or heard of the gate being knocked off its hinges. There is no evidence that a similar accident has ever previously occurred.

Plaintiff's contention is that defendant violated its duty imposed by the Federal Employers Liability Act (USCA Title 45, Sections 51 to 60) to provide him with a safe place to work, in that defendant "violated that duty by use of the pintle hinges in question for the reason that it knew, or must have known, that the gate in question was apt to come off said hinges and cause harm to its employees, including plaintiff." Defendant at the close of the evidence made a motion for directed verdict, and after adverse verdict, a motion for judgment notwithstanding verdict based on its contention that there was "no evidence of negligence on the part of the defendant where the sole evidence was that this gate hinge and this kind of hinge has been in customary and continuous use for this purpose for many years without accident and no one what-

ever had any idea or had foreseen that any accident might occur or that any hazard might be involved therefrom."

The question confronting us is whether the plaintiff has made out a case of negligence such as to entitle him to go to the jury. In approaching this problem we shall first summarize the applicable principles of law.

The employer under the Federal Employers Liability Act is required to furnish his employees a safe place to work and safe appliances. USCA Title 45, Sections 51-60. However, it has uniformly been held that liability arises from negligence not from injury. *Brady* v. *Southern R. Co.*, 320 U.S. 476, 484; *Chicago, St. P. M. & O. R. Co.* v. *Arnold*, 8 Cir., 16 F.2d 1002, 1006.

In *Urie* v. *Thompson*, 337 U.S. 163, the Court says: "What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs. * * *

"Negligence within the meaning of the Federal Employers Liability Act attached if respondent 'knew, or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect petitioner and similarly situated employees."

In *Wilkerson* v. *McCarthy*, 336 U.S. 53 we find: "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. * * * But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a

jury should hold a master "liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances," bearing in mind that "the standard of care must be commensurate to the dangers of the business."

In considering the motion to direct verdict all facts which plaintiff's evidence reasonably tends to prove must be assumed to have been established and all inferences fairly deductible from such facts must be drawn in his favor. *Egan Chevrolet Co.* v. *Bruner*, 107 F.2d 373; *McGivern* v. *Northern Pacific R. Co.*, 132 F.2d 213. In *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479, the Supreme Court, in speaking of the law applicable to direction of verdicts, lays down the following test: "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." In the above cited case it is also said: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury."

In *Lavender* v. *Kurn*, 327 U.S. 645, 653, the Court speaks as follows: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But

where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Supreme Court has granted certiorari in many cases arising under the Act. A list of such cases, showing their disposition, is attached as an appendix to Justice Douglas's opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 71. Judge Johnsen has reviewed this situation in *Louisville & N. R. Co.* v. *Botts*, 8 Cir., 173 F.2d 164, 166 and there says in part: "In this connection, heed necessarily must be given to the unmistakable teaching of the Supreme Court in its recent decisions, that trial and appellate courts, both federal and state, on questions of liability under the Federal Employers' Liability Act, have been taking too narrow a view generally of the scope of permissive inference which is open to a jury on 'probative facts'."

The fact that there may have been a safer method than that employed, or that danger might have been avoided by action in a different manner, does not necessarily make an act negligent. 65 C.J.S. 330, Negligence Sec. 2(i); *McGivern* v. *Northern Pacific R. Supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U.S. 521.

The decisive question in this case is whether the pintle hinge here used was such a hinge or device as would be provided by a person of ordinary prudence under the same or similar circumstances, having in mind his duty to furnish a safe place to work and reasonably safe appliances. The jury found that defendant had failed to exercise due care in furnishing this appliance. Is there evidence in the record to sustain such a verdict?

In resolving this question we must keep in mind the principle that for purposes of determining this question the evidence and all inferences that may reasonably be drawn therefrom must be viewed in the light most favorable to the plaintiff. The jury could readily find that the purpose of the gate was to restrain cattle while being unloaded. The defendant is charged with knowledge of the propensities of animals such as cattle—2 Restatement Torts, 290; *Northern Pacific* v. *Minnesota Transfer*, 219 Minn. 8, 16 N.W. 2d 894. The same type of hinge was in general use by the defendant in its many yards and hence defendant was familiar with its design, construction and operation and thus had knowledge of its potentialities and its suitability for the purpose for which it was being used. There is evidence from which the jury could find that the pintle hinge was not suitable for its intended purpose. Larson testified: "The pintle hinge is the least safe or secure of any of the hinges because all it takes is a slight upward movement on the gate or door turning on a pintle hinge to cause the gate or door to topple over. I would consider this a very makeshift and unsafe type of hinge because of the objections I have previously given to the use of either the loose pin or pintle type of hinge and also because in this installation there is no particular secure fastening on the post end of the hinge."

It can be argued that the experience of the witness in this type of construction is rather limited and that his testimony was weakened on cross-examination. However, generally the credibility of the witness and the weight to be given his testimony is for the jury rather than the court, and this rule seems to be very strictly applied in Federal Employers' Liability Act cases.

There is also evidence that the hinge could be made more safe at modest expense. It was possible under the record for the jury to find that an ordinary prudent per-

son in the exercise of ordinary care under the circumstances would anticipate that there was danger of the gate being knocked off of this kind of hinge and would have used a safer kind of hinge or a safety device. The plaintiff has made a prima facie case for the jury.

Defendant has intrdouced uncontroverted evidence that for many years it used the same type of hinge, similarly installed, at all its yards and that farm gates in the territory are generally so equipped and that there has been no previously known accident such as happened here. Such evidence is admissible and is very persuasive but under the record here made would fall under the general rule that the weight of the evidence is for the jury unless defendant can establish its contention that it has established a custom and that the customary way is per se the standard of care, and that he has fully complied with the custom.

The evidence covers only the use of the hinge by the defendant. There is no evidence that railroads or other large handlers of cattle in the territory generally use this type of hinge. There is evidence that many farm gates are so equipped but the situation of restraining animals in large farm enclosures is far different from the manner of confining a large number of cattle in a narrow chute. It would seem that the circumstances surrounding the farmer are not similar, at least as a matter of law, to the circumstances surrounding the defendant.

An individual or an individual corporation certainly can not set up his customary way of meeting a situation as a conclusive standard of care. Since no general trade custom has been established relative to gate installations, we are not directly confronted with the question of whether the customary way the situation is handled within a trade or industry is per se the standard of care. However, it would seem that such is not the rule in Federal

Courts. In *Texas and Pacific Railway Co.* v. *Behymer*, 189 U.S. 468, the defendant contended that the court should have instructed defendant's liability depended on whether the freight train was handled in the usual and ordinary way. As to this, the court, speaking through Mr. Justice Holmes, says: "Instead of that, the court left it to the jury to say whether the train was handled with ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the common-places of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." See also *Terminal Railroad Co.* v. *Shorb*, 8 Cir., 151 F.2d 361; *Frizzel* v. *Wabash R. Co.*, 8 Cir., 199 F.2d 153; *American Car and Foundry* v. *United States*, 8 Cir., 211 F. 862; *Hilweg* v. *Chesapeake & P. Telephone Co.*, CADC, 110 F. 2d 546; Annotation 68 A.L.R. 1400.

It follows that a case was made for the jury on the issue of whether the defendant in providing the pintle hinges hereinbefore described was exercising the care of a reasonable and prudent person under the same or similar circumstances. There was no error in overruling the motion for directed verdict or for judgment notwithstanding verdict.

The defendant with his motion for judgment notwithstanding verdict in the alternative moved for a new trial, which motion was overruled. While said motion sets out a number of grounds, the only error urged in argument and the only error reviewable upon appeal, relates to the court's refusal to give requested instructions numbers 1, 2, 3, 4, 5, 8, 10 and 11. Defendant submitted such request in full compliance with Rule 51 and timely exception was taken to the court's refusal to give them. Request

number 2 (failure to exercise due care is negligence); number 5 (remote possibilities need not be guarded against) appear to be adequately covered by the court's instructions. Requests number 9 (scienter), 10 (custom) and 11 (issue is design of hinges not of defects) do not appear to have sufficient evidentiary support to warrant the giving of such instructions. The remaining requested instructions are as follows:

1. The fact, standing alone, that the gate became unhinged and plaintiff was injured as a consequence, does not render defendant liable in this case. Before defendant would be liable, it would be necessary that negligence on its part be established which caused or contributed to plaintiff's injury. The mere happening of the accident, standing alone, does not tend to establish negligence. (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476.)

3. While the defendant was under a duty to exercise reasonable care in providing and maintaining for plaintiff a reasonably safe place to work, this does not mean that defendant was an insurer against all mishaps that might occur, nor that the properties where plaintiff would discharge his duties had to be maintained in a perfect condition. Defendant's duties are measured by reasonable and ordinary care under like circumstances; and if you find that that degree of care was exercised here, your verdict will be for the defendant. (*Wilkerson* v. *McCarthy*, 336 U. S. 53.)

4. In measuring the standard of care, it is not fair to take a point of view after the accident and impute negligence from the light of after events. In measuring the standard of care, the point of view to be taken should be that before the accident occurred, to see what, in the light of the facts then known, should have been anticipated. (*Burke* v. *Witherbee*, 98 N. Y. 562.)

8. In measuring the duty to anticipate—that is, in considering how much and how far the defendant ought to go in foreseeing and guarding against possible mishaps —the past experience respecting the device or situation in question may properly be drawn upon. It is entirely proper to take into account the fact that no accident of this kind is known to have occurred in the past, as bearing upon and indicating what should have been foreseen for the future. (*Charnock* v. *Texas & Pacific R. Co.* 194 U.S. 432.)

The citations following the above requests for instructions are those given by defendant in its brief. The correctness of the requested instructions is not challenged by the plaintiff. His position is that the trial court's instructions adequately covered the applicable law. If plaintiff's position in this respect is correct there would, of course, be no error in refusing the requested instructions. *Chicago & Northwestern Ry. Co.* v. *Curl,* 8 Cir., 178 F. 2d 497; *Thiringer* v. *Barlow,* 10 Cir., 205 F2d 476.

Defendant took no exceptions to the instructions given and makes no objection to them now. In any event there is nothing to review as to the instructions given in the absence of proper exceptions.

The right given by Rule 51 of Federal Rules of Civil Procedure to request instructions is a valuable right. In discussing this problem this court, in *Chicago & N.W. Ry. Co.* v. *Green,* 164 F. 2d 55, 61, says: "We think the refusal of the court to give the requested instruction, either in its tendered form or in a re-statement of its material substance, was error. It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. 53 Am. Jur., Trial 626, pp. 487, 488. See also, *Western Union Tel. Co.* v. *Morris,* 8 Cir., 105

F. 49, 54; *Northern Central Coal Co.* v. *Hughes*, 8 Cir., 224 F. 57, 59; *Ranney* v. *Barlow*, 112 U.S. 207, 214, 5 S.Ct. 104, 28 L. Ed. 662; *Pennock* v. *Dialogue*, 2 Pet. 1, 15, 27 U.S. 1, 15, 7 L. Ed. 327." See also, *Henwood* v. *Coburn*, 8 Cir., 165 F. 2d 418; *Montgomery* v. *Virginia Stage Lines*, CADC., 191 F. 2d 770.

The treatment of the legal issues in the instructions given is very general. It would appear that requested instructions 1, 3, 4 and 8 are substantially correct statements of applicable law supported by evidence. They are not attacked by plaintiff, nor does plaintiff point out where their substance is covered in the instructions given. Plaintiff does, however, make the general claim that the instructions given are fully adequate. The requested instructions involve some overlapping and are not approved as model instructions. They could, no doubt, be consolidated and re-stated in abbreviated form and combined with the balancing instructions.

It is necessary to consider the instructions given by the court to determine whether they properly covered the field of the requested instructions. The court, after stating the issues and advising the jury that the action is based on negligence and defining negligence and ordinary care, states: "The plaintiff contends in this case that the defendant was negligent in providing a door to the cattle chute on hinges that were dangerous and unsafe and that would permit the gate to become unhinged; that the gate as a result became unhinged and fell upon the plaintiff and knocked the plaintiff from the platform on which he was engaged in the performance of his duties to and upon the ground, as a result of which he was injured.

"It was the duty of the defendant to furnish the plaintiff a reasonably safe place to work and reasonably safe equipment with which to work, and *if the defendant failed to use reasonable care in the performance of that duty by*

providing a livestock loading chute and a gate thereto that were defective and unsafe due to defective or insecurely fastened hinges, and that as a result the gate became unhinged and fell in such a manner as to strike the plaintiff and knock him from the platform to and upon the ground when he was standing on the platform of the chute and engaged in the performance of his duties as a brakeman in the usual and customary manner on September 29, 1952, at the time of the accident, then the defendant was negligent, and if such negligence, in whole or in part, was the proximate cause of the accident and injuries to the plaintiff, your verdict should be for the plaintiff.

"On the other hand, if you find from the evidence in this case that the defendant railroad company used reasonable care in the construction and maintenance of the livestock chute and the gate thereto attached for loading and unloading stock at Walnut, Iowa, *so that the premises were reasonably safe for the plaintiff and employees of the railroad company for use in the performance of their work,* then the railroad company was not negligent, and your verdict should be for the defendant.

"No one is required to guard against that which a reasonably prudent person, under the circumstances, would not anticipate as likely to happen.

"If a person had no reasonable ground to anticipate that a particular act would or might result in injury to anybody, then the act would not be negligent at all."

The emphasized portions of the court's instructions could very easily give the jury the impression that they could find for the plaintiff if the gate was defective due to defective or insecurely fastened hinges, or if the premises were not reasonably safe. Or, in other words, that the standard of care was to furnish safe gates and a safe place to work. The true measure of defendant's liability and its obligation in this case is to use the care a

reasonable and prudent person would use under the same or similar circumstances in providing safe equipment and a safe place to work. The requested instructions, particularly request number 3, would have made it clear to the jury that the defendant was not an insurer of its employees' safety, that liability could not be based on the accident alone and that liability should turn on the question of whether due care was exercised in providing the equipment furnished under the circumstances. In *Chicago St. P. M. & O. R. Co.* v. *Arnold*, 160 F. 2d 1002, 1006, this court said that the trial court properly instructed the jury that the Railway Company was not an insurer of its employees. It is often difficult for jurors to understand technical and abstract legal propositions even though they may be correctly stated. There was relatively strong evidence in this case on the issue of ordinary care by the defendant. We believe that it was entitled to have its theory of the defense, to-wit that it had used due care in furnishing the gates and equipment, more specifically explained to the jury by setting out the substance of the matters requested in instructions 1, 3, 4 and 8, and that the Court's failure to give such instructions, or the substance thereof, was reversible error.

The order of the trial Court in overruling defendant's motion for a directed verdict and defendant's motion for judgment notwithstanding verdict is affirmed, but for errors of the Court in denying the requested instructions as herein above pointed out, the judgment is reversed and the cause is remanded to the trial court with directions to grant a new trial.

A true copy.

Attest:

E. E. KOCH

Clerk, U. S. Court of Appeals, Eighth Circuit.

(SEAL)